Supreme Court, U.S.
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NO. 01-1432 JAN 23 2002

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IN THE SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, in light of this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Petitioner's initial 28 U.S.C. § 2255 was properly denied and the lower court erred in refusing to issue a Certificate of Appealability where:

A. The Eleventh Circuit Court failed to acknowledge a grievous and substantial constitutional violation where the district court did not have jurisdiction to sentence the Petitioner because he was sentenced to life imprisonment for a crime to which he was not charged by the grand jury and which was not authorized by the verdict of the petit jury?

B. The rule in *Apprendi* that "any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt," *id.* at 530 U.S. 466, is a substantive, rather than procedural rule and, thus, is not subject to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989)?

C. The rule in *Apprendi* announced a new rule of constitutional law which falls within the "watershed exception" to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 311 (1989) and, thus, may be raised on collateral review in an initial 28 U.S.C. § 2255 Motion?

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B. The rule in *Apprendi* that "any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a

jury and proved beyond a reasonable doubt," *id.* at 530 U.S. 466, is a substantive, rather than procedural rule and, thus, is not subject to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) 14

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OPINIONS BELOW

The unpublished order denying the Petitioner's motion for certificate of appealability was entered on August 17, 2001. (Pet. App. at 23). The Eleventh Circuit's unpublished order denying petitioner's motion for reconsideration was entered October 25, 2001. (Pet. App. at 31).

The denial pf the Petitioner's motion to vacate, set aside or reduce his sentence filed pursuant to 28 U.S.C. § 2255.

JURISDICTION

The Order Denying Motion for Certificate of Appealability of the United States Court of Appeals for the Eleventh was entered on August 17, 2001. A timely Motion for Reconsideration of order Denying Certificate of Appealability was filed on August 27, 2001, and on October 25, 2001, the Eleventh Circuit entered an order denying said Motion for Reconsideration. (Pet.App. at 23, 24-30, and 31). The jurisdiction of this Court to review a the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct.Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 841(a) - Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b) - Penalties - (Excerpt)[1]

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

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[1] The excerpts include penalties for cocaine only.

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such

person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

IN THE
SUPREME COURT OF THE UNITED STATES
No. _____

RAMON LOPEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ramon Lopez, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the Order Denying Motion for Certificate of Appealability of the United States Court of Appeal for the Eleventh Circuit entered in this case on August 17, 2001, and Order entered on October 25, 2001, denying his Motion for Reconsideration of Order Denying Certificate of Appealability. In his appeal to the Eleventh Circuit, *Ramon Lopez* specifically argued that the quantity of drugs attributed to him violated ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).(See, i.e., Pet. App. at 38-61).

STATEMENT OF THE CASE

On April 24, 1997, *Ramon Lopez* together with five co-defendants, were indicted for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §846 in Count I, and possession with intent to distribute cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 in Count II. The Indictment did not specify that any specific quantity of cocaine, nor did the Government request jury instructions or verdict forms that required the jury to determine that element of the offenses charged. (91CR317-DE 1).

After a modified *Allen* charge was administered on the third day of deliberations, the jury convicted *Lopez* on both counts, but

acquitted his co-defendants, Nancy Garcia and Orosco-Zapata[2] (91CR317-DE 232,233,235).

The trial court sentenced *Lopez* to concurrent terms of life imprisonment, to be followed by five years supervised release. Further, pursuant to the Government's notice of intent to seek sentencing enhancement under 18 U.S.C. §3147, the trial court sentenced *Lopez* to a consecutive six month term of incarceration. (91CR317-DE-1,265). *Lopez* is presently incarcerated serving the sentence imposed in this cause.

On April 24, 1997, *Lopez* filed a *pro se* motion to vacate, reduce or set aside his sentence pursuant to 28 U.S.C. § 2255 (hereinafter "2255 motion"), raising, inter-alia, that *Lopez* was denied effective assistance of trial counsel;[3] in that trial counsel failed to investigate and challenge charges in the indictment at pre-trial and trial stages of the proceedings. (91-CR-317/97-CIV-1422-DE-318 at p. 6).

Thereafter, *Lopez* retained counsel and on July 20, 1998, *Lopez* filed a motion for leave to invoke discovery and/or expand the record pursuant to Rules 6 and 7 of the Rules governing 2255 proceedings in order to obtain and introduce evidence within the Government's possession and control of his first trial counsel's conflict of interest and ineffectiveness in failing to advise Lopez that the government provided him a written plea agreement after Lopez was debriefed. (91CR317-DE-345,346,350,351).

Without ruling on *Lopez'* motion for leave to invoke discovery and/or expand the record, on December 18, 1998, the Magistrate Judge entered a Report and Recommendation denying *Lopez'* 2255 Motion, (DE-3), and *Lopez* filed a motion for reconsideration of said Report and Recommendation. (91CR317-DE-356).

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[2]Three of the originally charged codefendants, Gerardo Machado, Redelio Garcia and Luz Mary Del Pino, plead guilty. (91CR317-DE 192). However, at trial, two of the three who plead guilty testified for *Lopez* and one testified for the Government. (91CR317-R5-396, R10-1089-90,1173).

[3]Referred to in the Record as Claim V of Lopez' 2255 Motion.

The District Court then entered an Omnibus Order granting, in part, *Lopez'* motion for reconsideration, but denying his motions for leave to invoke discovery and/or expand record, and to stay pending ruling on disclosure of discovery in related matter. (91CR317-DE-358). The order remanded *Lopez'* ineffective assistance of counsel claim[4] back to the Magistrate Judge for further consideration. *Id.*

On June 21, 2000, the Magistrate Judge entered a Supplemental Report and Recommendation denying Claim V of Lopez' 2255 Motion without an evidentiary hearing, to which Lopez filed written objections. (91CR317-DE-380,384,387). The District Court then entered an Order summarily denying the written objections. (91CR317-DE-388). Thereafter, *Lopez* moved for leave[5] to file a motion for reconsideration and further supplement his 2255 Motion with an *Apprendi* claim. Those requests were likewise summarily denied. (91CR317-DE-389-90). Thereafter, this appeal ensued, and the District Court denied Lopez' a Certificate of Appealability. (91CR317-DE-391).

INTRODUCTION

The Petitioner in this case, Mr. Lopez (hereinafter referred to as "Petitioner" or "Mr. Lopez") is presently serving a life sentence for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), where neither the indictment charged nor the jury instructions required the jury to find any quantity of drugs. As a result, the statutory maximum sentence under the charging statute is 20 years. Accordingly, the life sentence imposed in the instant case violates the Constitution. If this sentence is left in place, Mr. Lopez will serve untold years in prison, beyond that authorized by the charging statute and the jury's verdict. Petitioner states that such an outcome, violative of his Due Process rights, should not stand. The issue squarely before the Court is whether such a grievous unconstitutional outcome will be addressed on the merits and corrected, or whether it will be permitted to stand

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[4]Referred to in the Record as Claim V of Lopez' 2255 Motion.

[5]The Clerk had sent the Order to the undersigned's previous address. Therefore, the Order was not received within 10 days of its entry, and leave was accordingly sought.

on conflicting procedural interpretations regarding collateral review and procedural default doctrines.

ARGUMENT

I. IN LIGHT OF THIS COURT'S RULING IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000), THE PETITIONER'S INITIAL 28 U.S.C. § 2255 WAS IMPROVIDENTLY DENIED AND THE LOWER COURT ERRED IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE:

A. The Eleventh Circuit Court failed to acknowledge a grievous and substantial constitutional violation where the district court did not have jurisdiction to sentence the Petitioner because he was sentenced to life imprisonment for a crime to which he was not charged by the grand jury and which was not authorized by the verdict of the petit jury.

The Eleventh Circuit's held in ***McCoy v. United States,*** 266 F.3d 1245, 1249 (11th Cir. 2001), that ***Apprendi*** errors are not jurisdictional and are subject to plain error review where the sentence will not be disturbed where the *court* deems the evidence of drug quantities adduced at trial sufficient to support the sentence imposed even if such evidence was neither charged in the indictment, nor submitted to the jury for a beyond a reasonable doubt determination. Such a ruling directly conflicts with the Fifth Circuit's holding in ***United States v. Gonzalez,*** 259 F.3d 355 (5th Cir. 2001), that "the district court lacks the jurisdiction to impose a sentence exceeding the statutory maximum of the offense alleged in the indictment..." *Id.* at 360-61, n. 3. Moreover, the split in the Courts on this issue extend well beyond the Fifth and Eleventh Circuits. The District of Columbia, First, Third and Seventh Circuit Courts have generally followed the Eleventh Circuit in holding that there is no jurisdictional defect in trying and sentencing a defendant based on quantities of drugs neither alleged in the indictment, nor submitted to the jury because the federal courts retain subject matter jurisdiction to hear a case once an indictment is returned by the grand jury. *See* ***United States v. Fields,*** 242 F.3d 393 (D.C. Cir.), *aff'd and amended on reh'g,* 251 F.3d 1041 (D.C. (Cir. 2001)(the court

remanded where the evidence "as to quantity was not so overwhelming"). 251 F.3d 1045. In a later case, however, the court, applying the analysis of ***Johnson v. United States,*** 520 U.S. 461 (1997), declined to grant relief because the evidence of drug quantity was overwhelming and had not been contested at trial or sentencing. ***United States v. Webb,*** 255 F.3d 890, 900-01 (D.C. Cir. 2001). *See also* ***United States v. Mojica-Baez,*** 229 F.3d 292 (1st Cir.), *cert. denied,* 121 S.Ct. 2215 (2001)(concluding that failure of grand jury to charge an element of the offense is not a structural error), *id.* at 311; ***United States v. Vasquez,*** 271 F.3d 93 (3rd Cir. 2001)(citing ***Neder*** and rejecting the contention that ***Apprendi*** error should be treated as structural. *Id.* at 103, denied relief based on the evidence of quantity adduced at trial. *Id.* at 104); ***United States v. Bjorkman,*** 270 F.3d 482 (7th Cir. 2001)(rejected argument that, where the indictment did not charge quantity, the district court lacked subject matter jurisdiction). *Id.* at 490.

Applying a plain error standard of review, these Circuits have generally held that failure to charge quantity in the indictment is not a jurisdictional defect, and that such error is subject to plain error review where the sentence will not be overturned when the evidence as to quantity adduced at trial is "overwhelming" or "whether the evidence was sufficiently conclusive to support the sentence actually imposed." The Eleventh Circuit, feeling itself constrained to follow ***Neder v. United States,*** 527 U.S. 1 (1999),[6] joined with the First and Seventh Circuit Courts to arrive at the conclusion that an appellate court can be confident in retrospect that a grand jury *would* have returned an indictment charging the requisite quantity whenever the trial evidence was so strong that the petit jury *would* have been bound to reach the same conclusion. *See* ***McCoy*** at 1251, *quoting* ***United States v. Martinez,*** 258 F.3d 582, 587 (7th Cir. 2001). In doing so, these lower courts have impermissibly replaced *all* Constitutionally required triers of fact with their pure speculation

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[6]Erroneous jury instructions that omit element of the offense is subject to harmless error analysis. ***Neder*** 527 U.S. at 10.

concerning a hypothetical jury's actions.[7]

In ***McCoy***, the Eleventh Circuit came to the conclusion that ***Apprendi*** error based upon an indictment that does not notice an element of the offense (such as drug quantity in the §841 context) is not jurisdictional in nature. The Court reached that conclusion based upon the following analogy:

> [t]he constitutional right to be charged by a grand jury is a personal right of the defendant and does not go to the district court's subject matter jurisdiction because it may be waived. *See* Fed.R.Crim.P. 7(b). Thus, the constitutional right to be charged by a grand jury indictment simply does not fit the mold of a jurisdictional defect, because it is a right that can be waived.

Id. at 1249.

The opinion neglects to mention that when a defendant waives indictment, it is replaced with an information which serves, at the very least, as legally sufficient notice to the defendant of the charges which he must face and their penalties, and preserves a defendant's right to challenge jurisdictional defects See, ***United States v. Borja,*** 191 F.Supp. 563 (D.C. Guam 1961); and ***United States v. Hearne,*** 6 F.R.D. 294 (E.D. Wis. 1946). Therefore, it is axiomatic that requiring *neither* an indictment, *nor* an information *would* constitute a structural error of the highest degree -- particularly in the sentencing context. Further, merely retaining subject matter jurisdiction to *try* the case does not mean that the district court retains jurisdiction to *sentence* the defendant when such a sentence

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[7]*See* ***Smith v. United States,*** 360 U.S. 1, 9 (1959)("the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules"). *See also* ***Sullivan v. Louisiana,*** 508 U.S. 275, 310 (1993)(finding that where an instructional error consists of a misdescription of the burden of proof, "a reviewing court can only engage in pure speculation [regarding] what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty'"), *internal citations omitted*; ***Sullivan v. Louisiana,*** 508 U.S. 275, 280 (1993)(in a case finding that defective reasonable doubt instructions to the jury constituted structural error, this Court held that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action...").

would be based on charges not stated in the indictment or the information (if the indictment were waived), nor authorized by the jury's verdict. *See* ***Gonzalez,*** 259 F.3d at 360-61.

The Second, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, on the other hand, have generally recognized the jurisdictional defect inherent in indictments which do not specify quantity, and the concomitant prohibition on sentencing the defendant for an offense greater than that charged by the grand jury. These Circuits have not explicitly ruled that it is a jurisdictional defect, but after applying the plain error factors prescribed in ***Olano v. United States,*** 507 U.S. 725 (1993), have held that such is *per se* reversible error. Petitioner respectfully suggests that such is the only correct result consistent with the Fifth Amendment grand jury guarantee. *See* ***United States v. Thomas,*** 274 F.3d 655, 672 (2nd Cir. 2001), *en banc,* (finding error in sentencing where the district court imposed a sentence it had no authority to impose; and finding error in conviction of a defendant for a crime different than the crime charged in the indictment). *See also* ***United States v. Cotton***, 261 F.3d 397, 403-07 (4th Cir.), *cert. granted,* – S.Ct. –, 2002 WL 10623, 70 USLW 3348 (U.S. Jan. 04, 2002)(No. 01-687)(concluding that, where quantity is not charged in the indictment, the defect inherent in sentencing a defendant for a crime with which he was not charged is so fundamental as to always require correction under the plain error standard, no matter how strong the quantity evidence at trial); ***United States v. Gonzalez,*** 259 F.3d 355, 360-61, n. 3 (5th Cir. 2001)(noticing jurisdictional nature of ***Apprendi*** error in the indictment and sentencing context); ***United States v. Maynie,*** 257 F.3d 908, 921 (8th Cir. 2001)(finding ***Apprendi*** error because "a judge lacks the authority to sentence a defendant to an uncharged crime"); ***United States v. Buckland,*** 259 F.3d 1157, 1163-68 (9th cir.), *reh'g en banc granted,* 265 F.3d 1085 (9th Cir.)(finding 21 U.S.C. § 841 facially unconstitutional because of the "structure of the statute itself" combined with its legislative history); and, ***United States v. Jackson,*** 240 F.3d 1245, 1248-49 (10th Cir.), *cert. denied,* 122 S.Ct. 112 (2001)(holding that ***Apprendi*** error, where the greater offense is not charged in the indictment, requires resentencing on the lesser offense, without harmless or plain error review, as such

sentences are "unauthorized").

The applicability of ***Apprendi*** to the instant case is clear. The counts upon which Mr. Lopez was found guilty did not reference any amount of cocaine. No drug quantity was alleged in the indictment. *Not one* overt act listed any quantity of drugs. Moreover, the issue of quantity of drugs was never submitted to the jury. In the 21 U.S.C. § 841 context, where the quantity of drugs is not charged in the indictment, a defendant has not been charged with a crime punishable under § 841(b)(1)(B). It follows, therefore, that Mr. Lopez may not be consistently be sentenced to more than the maximum of 20 years provided in the default provisions of § 841(b)(1)(C) which does not require any particular amount of controlled substance to be charged of proven. Where the indictment alleges only the lesser offense, sentencing Mr. Lopez for the uncharged, greater offenses, was effectively a constructive amendment of the indictment, which under ***Ex Parte Bain,*** 121 U.S. 1 (1887)[8], ***Stirone v. United States,*** 361 U.S. 212 (1960)[9], and ***Russell v. United States,*** 369 U.S. 749 (1960)[10] is forbidden.[11] Mr.

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[8]The failure of the Grand Jury to charge the defendant with the elements of an offense is a jurisdictional bar to prosecution for that offense which has been settled by this Court since its decision in ***Bain:*** an indictment found by the grand jury is "indispensable to the power of the court to try the petitioner for the crime with which he is charged." *Id.* 121 U.S. at 12.

[9]This Court explicitly reaffirmed ***Bain*** in ***Stirone***, explaining that the very purpose of the Fifth Amendment grand jury clause was to limit a defendant's "jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge." *Id.* at 218. Here, the Court concluded that the deprivation of the defendant's "substantial right to be tried only on charges presented in an indictment returned by a grand jury...is far too serious to be...dismissed as harmless error." *Id.* at 217.

[10]The principle of ***Bain*** and ***Stirone***—that an indictment charging all of the essential elements is a prerequisite to conviction for that offense—was again reaffirmed in ***Russell*** at 764-65 ("an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense to be punished*;"), internal citations omitted; emphasis added.. This principle was reaffirmed in ***Apprendi*** itself: "[t]he judge's role in sentencing is constrained at its outer limits

Lopez was therefore sentenced to life imprisonment on these counts in violation of the due process and grand jury clauses of the Fifth Amendment and of the jury trial guarantee of the Sixth Amendment. These constitutional violations require vacating Mr. Lopez' sentence without a showing of prejudice. *See* ***Stirone*** at 217.

This issue is of grave import to the Petitioner because the district court lacked jurisdiction to impose a sentence for a crime for which was not charged, and, inasmuch as lack of jurisdiction can be raised at any time[12], then this Court need not reach any other issue.

B. THE RULE IN *APPRENDI* THAT "ANY FACT THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE STATUTORY MAXIMUM, OTHER THAN A PRIOR CONVICTION, MUST BE SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT, *ID.* AT 530 U.S. 466, IS A SUBSTANTIVE, RATHER THAN PROCEDURAL RULE AND, THUS, IS NOT SUBJECT TO THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE V. LANE*, 489 U.S. 288 (1989).

Whether the ***Teague*** doctrine on retroactivity applies to bar Petitioner's ***Apprendi*** claim is a matter not yet address by the majority of the Circuit Courts. Those that have reached this issue have held that retroactive application of ***Apprendi*** is barred by ***Teague***. *See* ***McCoy v. United States,*** 266 F.3d 1245 (11th Cir. 2001)(10 year sentence); ***Dukes v. United States,*** 255 F.3d 912 (8th Cir. 2001)(life sentence); ***United States v. Moss,*** 252 F.3d 993, 997

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by the facts alleged in the indictment and found by the jury." *Id.* 530 U.S. at 483, n. 10.

[11]It is a "well settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." ***Russell v. United States,*** 369 U.S. 749, 770 (1962), *citing* ***Bain*** at 10, ***United States v. Norris,*** 281 U.S. 619, 622 (1930), *and* ***Stirone*** at 218.

[12]*See* ***United States v. Timmerick***, 441 U.S. 780, 783 (1979)(acknowledging fundamental nature of jurisdictional error which can be raised on collateral review). *Citing* ***Hill v. United States,*** 368 U.S. 424 (1962). *See also* ***United States v. Addonizo,*** 444 U.S. 178, 185 (1979)(same), *citing, Ex Parte Watkins,* 3 Pet. 193, 202-203, 7 L.Ed. 650 (Marshal, C.J.).

(8th Cir. 2001)(360 month sentence); ***United States v. Sanders,*** 247 F.3d 139, 147 (4th Cir. 2001)(188 month sentence); and ***Jones v. Smith,*** 231 F.3d 1227, 1236 (9th Cir. 2000)(life sentence). The threshold, inquiry, therefore, is whether the rule annunciated in ***Apprendi*** is substantive or procedural. *See* ***Bousley v. United States,*** 523 U.S. 614, 620-21 (1998)(holding that substantive rules are automatically applied retroactively, procedural rules generally are not).

Few courts that have addressed the retroactivity of ***Apprendi*** have considered whether the rule is substantive or procedural. *See* ***United States v. Clark,*** 260 F.3d 382 (5th Cir. 2001)(Parker, J., *dissenting*)(in a case where the district court remanded for further consideration, Judge Parker opined that ***Aprendi*** announces a new substantive rule, and that ***Teague's*** prohibition against retroactivity does not apply. He further stated that the matter should not be remanded, because the court could directly address the underlying claims without further delay. Judge Parker based his conclusion on the prior precedent retroactively applying ***Richardson v. United States,*** 526 U.S. 813, (1999) and ***Bailey v. United States***, 516 U.S. 137 (1995), and the risk that a person may be subjected to the maximum term of ten years to life imprisonment while being "actually innocent" of a sentencing enhancement while guilty of the underlying offense). *Id.* at 383-389. *See also* ***United States v. Hernandez,*** 137 F.Supp.2d 919, 928-29 (N.D.Ohio 2001); ***Darity v. United States,*** 124 F.Supp.2d 355, 360-61 (W.D.N.C. 2000), *overruled by* ***United States v. Sanders,*** 247 F.3d 139 (4th Cir. 2001); ***Ware v. United States,*** 124 F.Supp.2d 590, 595-96 (M.D.Tenn. 2000)

Most courts, centering on the majority's statement in ***Apprendi*** that "[t]he substantive basis for New Jersey's enhancement is thus not an issue; the adequacy of New Jersey's procedure is," ***Apprendi*** 530 U.S. at 475, have summarily concluded that the rule is procedural and have analyzed ***Apprendi*** using the ***Teague*** framework and its two exceptions. *See ante.* Most significantly, however, the ***Teague*** analysis does not apply to substantive rules, such as those construing the meaning of federal criminal statutes. *See* ***Bousley***, 523 U.S. at 620 ([B]ecause ***Teague*** by its terms applies only to procedural rules, we think it is inapplicable to the situation in which

this Court decides the meaning of a criminal statute enacted by Congress"). Petitioner therefore submits that the primary feature of the new rule is its substantive construction of federal criminal statutes and that the rule is therefore retroactive.

As the ***Clark*** dissent points out, the procedural part of the ***Apprendi*** rule – that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," ***Apprendi,*** 530 U.S. at 477 (alteration in original)(*quoting* ***United States v. Gaudin,*** 515 U.S. 506, 510 (1995)) – is not new: it is merely a recitation of the procedural guarantees contained in the Fifth, Sixth, and Fourteenth Amendments. ***Clark*** at 386. The new part of the ***Apprendi*** rule, however, is the Supreme Court's application of this long-recognized constitutional principle. By holding that any fact that increases the maximum punishment for an offense must be submitted to a jury and proven beyond reasonable doubt, this Court added substantive elements to every criminal statute purporting to allow a judge acting alone to impose punishment in excess of the statutory maximum. *Id.* The Court explained in ***Apprendi*** that a sentencing factor that increases the maximum punishment for an offense is the "functional equivalent of an element of a greater offense than the one covered by the jury's verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." ***Apprendi,*** 530 U.S. at 494, n. 19. Since the ***Apprendi*** rule interprets the meaning of a multitude of criminal statutes, including the statutes at issue here, Petitioner believes it is a substantive rule of law retroactively applicable to cases on collateral review.

This result would be consistent with the Second Circuit's recent decision in ***Santana-Madera v. United States,*** 260 F.3d 133 (2nd Cir. 2001),[13] that the new rule announced by the Supreme Court in ***Richardson v. United States,*** 526 U.S. 813 (1999), is substantive and therefore retroactive. Prior to ***Richardson,*** a jury deciding whether a defendant had engaged in a continuing criminal enterprise

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[13] ***Santana-Madera*** did expressly not reach the issue of whether or not ***Apprendi*** could be retroactively applied, leaving that "for another day." *Id.* at 135.

("CCE") in violation of 21 U.S.C. § 848 was required to unanimously agree that the defendant committed at least three federal narcotics violations, but it was not required to agree as to which specific violations constituted the offense. ***Santana-Madera*** at 136. In ***Richardson***, this Court found such a practice to be unconstitutional, holding that each of the violations making up the series was a separate element of the CCE offense that must be unanimously agreed upon by the jury. ***Richardson,*** 526 U.S. at 818-19, 824. The Second Circuit concluded in ***Santana-Madera*** that because ***Richardson*** "interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense" it "alter[ed] the meaning of the substantive criminal law," and was therefore retroactively applicable on collateral review. ***Santana-Madera*** at 138. Because it was implicit in the jury's verdict in ***Santana-Madera*** that the jurors agreed that the defendant was guilty of at least three narcotics violations, the issue was not whether the defendant had potentially been convicted of conduct which was not legal, but rather, whether each member of the jury had the same series of violations in mind when they voted to convict. As a result, the Second Circuit's determination that the ***Richardson*** rule is substantive conforms with Petitioner's view that decriminalization of conduct is not an essential characteristic of a "substantive" rule.

Moreover, this appears to be the correct result under ***Davis v. United States,*** 417 U.S. 333 (1974), which first established the principle that a substantive change in the law is applicable to cases on collateral review. There is nothing in ***Davis*** that expressly limits substantive rules to those rules that decriminalize conduct previously thought to be illegal. Applying ***Davis***, the appropriate inquiry is not whether the new rule decriminalizes conduct, but rather, whether the error of law sought to be raised is "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t present[s] exceptional circumstances where the need for remedy afforded by the writ of habeas corpus is apparent." ***Davis,*** 417 U.S. at 346 (alteration in original)(*quoting* ***Hill v. United States,*** 368 U.S. 424, 428 (1962)).

In the case at bar, Mr. Lopez is the victim of a genuine ***Apprendi*** error and, thus, meets the ***Davis*** test. The unconstitutional

length of his life imprisonment rests on a purely judicial finding made using the lowest standard of proof known to our judicial system. Accordingly, Petitioner has been deprived of his liberty without the benefits of the heightened protections that are the hallmarks of American jurisprudence. While the lower courts may view legitimate ***Apprendi*** claims as rare, the flood of, perhaps, unmeritorious claims does not alter the fact that ***Apprendi*** represents substantive change in the law that is retroactively applicable on collateral review.

Although the Petitioner has shown that he is entitled to the benefit of the ***Apprendi*** rule on collateral review, he must also show both cause for failure to raise the issue on direct appeal, and actual prejudice resulting therefrom. ***Bousley v. United States,*** 523 U.S. 614, 622 (1998).

Cause:

Petitioner has established cause sufficient to excuse his failure to raise the ***Apprendi*** issue on direct appeal under the rule of ***Reed v. Ross,*** 468 U.S. 1 (1984). In ***Reed***, this Court held that the novelty of a constitutional claim can constitute cause for failure to raise it on direct review if the claim's "legal basis [was] not reasonably viable to counsel." *Id.* at 16. To hold otherwise, this Court stated, would disrupt criminal proceedings by "encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 15-16. This Court further stated that when it articulates a constitutional principle which:

> 'overturns . longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved...' there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [lower] court to adopt the position that this Court has ultimately

> adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a [lower] court is sufficiently excusable to satisfy the cause requirement.

Id. at 17, *quoting*, ***United States v. Johnson,*** 457 U.S. 537, 551 (1982). *Accord* ***Ingber v. Enzor,*** 841 F.2d 450, 454-55 (2nd Cir. 1988)(penalizing a § 2255 petitioner for failing to challenge a decade of entrenched precedent on direct appeal would "ascribe to attorneys...the power to prognosticate with greater precision than judges of this court" and would "encourage appeal of even well-settled points of law").

Such is the situation presented in the instant case. Prior to ***Apprendi***, all twelve circuit courts had specifically rejected the argument that drug quantity was an element of the offense under 21 U.S.C. § 841. To now penalize Petitioner for failing to raise an ***Apprendi*** claim on appeal when that argument had been foreclosed by the Eleventh Circuit[14] (and every other court in the country) would be unjust and produce an undesirable result. As this Court noted in ***Reed***, such a policy would thwart judicial economy in criminal proceedings. Defense lawyers would have to choose between raising every remotely conceivable constitutional claim at trial and on appeal, including those precluded by binding precedent, or being subjected to claims for malpractice and ineffective assistance of counsel in the event this Court eventually recognizes a right that might have benefitted their client had they anticipated it long before.[15] Accordingly, inasmuch as the Petitioner was foreclosed by

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[14]*See* ***United States v. Cross,*** 916 F.2d 622, 623 (11th Cir. 1990).

[15]One can also envision appellate and post-conviction counsel running afoul of court proscriptions by filing what could be considered as frivolous arguments against binding precedent. *See* Fed.R.Civ.P. 11(e). *See also* ***United States v. Smith,*** 250 F.3d 1073 (7th Cir. 2001), Wood, J., *dissenting* ("fear[ing]...administrative nightmare...[as] defense counsel will have no choice but to file one 'kitchen sink' brief after another" to avoid "a procedural default that cannot be overcome for good cause."). *Id.* at1077.

firmly entrenched precedent from raising the ***Apprendi*** issue on direct appeal, he has demonstrated cause sufficient to excuse his failure to raise the issue on direct appeal.

Mr. Lopez is serving a term of life imprisonment based upon an indictment that omitted an essential element of the offense with which he was charged and which the jury verdict did not authorize. Thus, in the instant case, a quintessential jurisdictional error occurred. As Judge Arnold's well-reasoned *dissent* in ***United States v. Moss,*** 252 F.3d 992 (8th Cir. 2001) so aptly stated when calling into doubt the majority's opinion:

> The Supreme Court in ***Neder v. United States,*** 527 U.S. 1, 8-9...(1989), has held that it is not always reversible error to fail to submit to a jury an essential element of a criminal offense. If, for example, no reasonable jury could have found against the prosecution with respect to this element, the error can be treated as harmless. The same thing, however, cannot be said of the other part of the ***Apprendi*** principle – that every element of a crime must be charged in an indictment (if the crime is federal). *As far as I am aware, no case has ever held that the omission of an element of a crime from an indictment can be harmless error. In such cases, we do not ask whether a jury would have found that element on the evidence submitted to it, or, indeed, whether the grand jury would have returned an indictment including that element if it had been asked to do so. Rather, an indictment that*

> *omits an element of a crime is structurally deficient and provides no lawful basis for bringing anyone to trial. Failure to include an essential in a federal indictment warrants relief even if the government later proves the omitted element at trial.*

Moss, 252 F.3d at 1005. (Internal citation omitted). (Emphasis added).

If, under these circumstances, Petitioner's life sentence does not constitute significant prejudice, he respectfully submits that such a prejudicial threshold is "beyond the pale" in current American jurisprudence.

C. THE RULE IN *APPRENDI* ANNOUNCED A NEW RULE OF CONSTITUTIONAL LAW WHICH FALLS WITHIN THE "WATERSHED EXCEPTION" TO THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE V. LANE*, 489 U.S. 288, 311 (1989) AND, THUS, MAY BE RAISED ON COLLATERAL REVIEW IN AN INITIAL 28 U.S.C. § 2255 MOTION.

Alternative, Mr. Lopez submits that the new rule of law announced in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000), that "any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt" [*id.*], falls within the "watershed exception" to the non-retroactivity doctrine of ***Teague v. Lane,*** 489 U.S. 288 at 311 (1989). The applicability of ***Apprendi*** to drug cases raises the question of whether the courts must retroactively apply the new rule to similarly situated defendants who, like the Petitioner, have submitted this issue on an initial Title 28 U.S.C. § 2255 Motion To Vacate, Correct or Set Aside an Illegal Conviction and/or Sentence.

Generally, new constitutional rules of criminal procedure apply retroactively only to cases which are on direct state or federal appeal at the time the rule is announced. *See* ***Griffith v. Kentucky,*** 479 U.S. 314 (1987). A new rule is not to be applied retroactively on collateral review unless the rule falls within one of two narrow

exceptions: (1) the new rule places certain kinds of primary conduct beyond the power of the criminal lawmaking authority to proscribe, or (2) the rule requires the observance of "those procedures that...are 'implicit in the concept of ordered liberty.'" ***Teague,*** 489 U.S. at 305-310 (*citations omitted*). The first exception to the general rule prohibiting retroactivity applies only to rules that decriminalize a class of conduct or prohibit certain category of punishment for a class of defendants because of their status or offense. *See* ***Saffle v. Parks,*** 494 U.S. 484, 495 (1990). Petitioner concedes this exception is inapplicable to the instant case. However, the ***Apprendi*** decision does implicate the second exception, which applies to those "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" and "without which the likelihood of an accurate conviction is seriously diminished." ***Sawyer v. Smith,*** 497 U.S. 227, 242-244 (1990), *quoting* ***Teague,*** 489 U.S. at 311, 315. The Court in ***Apprendi*** concluded that the Constitution requires a jury finding on any fact which increases the statutory maximum penalty. This conclusion compels a radical shift in criminal procedure in federal cases.[16] Such a sweeping new requirement is so grounded in fundamental fairness that it may be considered of "watershed importance."

Apprendi raises the standard for determining elements that subject a criminal defendant to a higher term of imprisonment from a preponderance of the evidence to beyond a reasonable doubt. ***Apprendi*** requires such elements to be determined by a jury, thereby enforcing a defendant's right to trial by jury on such issues. Moreover, the requirement that every element of a crime, defined as every fact that increases the statutory maximum, be charged in the indictment improves the accuracy of the fact-finding process because it reduces the risk that an innocent person might be convicted of a more serious crime, or that a guilty person might be punished more severely than the law allows. Indeed, in ***Apprendi*** this Court stated

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[16]As noted in §B, *supra*, prior to this Court's ***Apprendi*** ruling, all twelve circuit courts had specifically rejected the argument that drug quantity was an element of the offense under 21 U.S.C. § 841.

"[a]t stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury,' Amdt. 6." ***Apprendi*** 530 U.S. at 476-477. Most significantly, four justices almost explicitly endorsed a ***Teague*** exception for ***Apprendi*** claims in their reading of the majority opinion by stating "[t]oday, in what will surely be remembered as a *watershed* change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in ***Jones***."[17] ***Apprendi,*** 530 U.S. at 524 (O'Connor, J., *dissenting*)(emphasis added). A decision, such as ***Apprendi***, which overturned well-settled precedent in all twelve circuit courts, can hardly be considered as non-substantive or usual. Indeed, the Eleventh Circuit's unconstitutional hurdle, as established in ***McCoy,*** barring defendants from collaterally attacking sentences and conviction arrived at in an unconstitutional manner, has created a split within the circuits for those who, like the Petitioner herein, raised their ***Apprendi*** claims in § 2255 motions. Thus, it is time for this Court to resolve the Circuit conflicts and address the retroactivity of ***Apprendi***:for defendants raising same on collateral review.

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[17]In ***Jones v. United States,*** 526 U.S. 277 (1999), this Court first identified the principle that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt." *Id.* U.S. at 243, n. 6. The Court held that serious bodily injury under the federal car-jacking statute, *see* 18 U.S.C. § 2119(2), is an element of the offense, not a sentencing factor, which must be charged in an indictment and submitted to the jury. *Id.* at 251-252.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant certiorari, review herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* Express Mail, this 23rd day of January, 2002, to: ***Susan Ponzoli, Assistant United States Attorney,*** Appellate Division, 99 Northeast Fourth Street, Miami, Florida 33132, and ***Solicitor General***, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

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